88-898

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LEE LEWIS COHEN and
TERRY GEORGE RUGER

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA

Appellee

ON APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA

The Appellants, Lee Lewis Cohen and Terry George Ruger, pray that this Honorable Court note probable jurisdiction of this appeal from the final judgment of the Superior Court of Pennsylvania dated February 23, 1988.

QUESTION PRESENTED

WHETHER THE PENNSYLVANIA PROSTITUTION STATUTE - IS UNCONSTITUTIONALLY VOID-FOR-VAGUENESS AS APPLIED TO MANUAL MASTURBATION FOR HIRE, GIVEN THE LIMITED DEFINITION OF PROSTITUTION IN THE STATUTE, THE PRIOR STATUTORY AND CASE LAW THAT DEFINED PROSTITUTION AS SEXUAL INTERCOURSE FOR HIRE AND THE LACK OF PENNSYLVANIA APPELLATE COURT DECISIONS APPLYING MANUAL MASTURBATION TO THE PROSTITUTION STATUTE AT THE TIME OF THE APPELLANTS' ARREST?

LIST OF PARTIES

Lee Lewis Cohen, of 1512 Sherwood Drive, East Meadow, New York and the Commonwealth of Pennsylvania, through District Attorney Merritt E. McKnight, of 214 1/2 East Main Street, Lock Haven, Pennsylvania, were the parties in the Superior Court of Pennsylvania in Case No. 309 Harrisburg, 1987. Terry George Ruger, of R. D. #1, Briarcrest Drive, Dallas, Pennsylvania and the Commonwealth of Pennsylvania, through District Attorney Merritt E. McKnight, of 214 1/2 East Main Street, Lock Haven, Pennsylvania were the parties in the Superior Court of Pennsylvania in Case No. 310 Harrisburg, 1987. The Superior Court issued a single opinion in the consolidated appeal.

Lee Lewis Cohen and Terry George Ruger filed a joint Petition for

Allowance of Appeal in the Supreme Court of Pennsylvania in Case No. 72 M. D. Allocatur Docket 1988. The Supreme Court issued a single per curiam order denying the petition.

The attorney general of the Commonwealth of Pennsylvania in Harrisburg, Pennsylvania nas been notified of the present appeal.

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CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment

> No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ...

Fourteenth Amendment, Section One

> Section 1 - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

18 Pa. C.S.A. §5902 Prostitution and Related Offenses, Act of Dec. 6, 1972, P.L. 1482, No. 334, §1, effective June 6, 1973, as amended 1978, Oct. 4, P.L. 909, No. 173, §2, effective in 60 days.

This section is reproduced in the Appendix at Pages 46a-50a.

OPINIONS BELOW

The Clinton County Court of Common Pleas filed a written Opinion on the Petitioners' Post-Veridict Motions on January 23, 1987. This Opinion, which is unpublished, is reproduced in the Appendix at Pages 16a-27a.

By Opinion rendered February 23, 1988, the Superior Court of Pennsylvania affirmed the Petitioners' convictions. See, Commonwealth vs. Cohen, Pa. Super , 538 A. 2d 582 (1988). This opinion is reproduced in the Appendix at Pages 28a-40a.

The Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal on October 5, 1988 by per curiam order. No written opinion was rendered. The per curiam order is reproduced in the Appendix at Page 41a.

JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on February 23, 1988, affirming the Appellants' sentences dated April 27, 1987. On October 5, 1988, the Supreme Court of Pennsylvania denied the Appellants' Petition for Allowance of Appeal.

Notice of Appeal to this Court was timely filed in the Supreme Court of Pennsylvania, the Superior Court of Pennsylvania and the Court of Common Pleas of Clinton County, Pennsylvania on or about November 28, 1988.

This appeal is being docketed in this Court within ninety (90) days from the denial of the Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

STATEMENT OF THE CASE

The Appellants were the owners and operators of the Taj Mahal II, a massage parlor operating in Dunnstable Township, Clinton County, Pennsylvania. Following an undercover investigation by the Pennsylvania State Police, both Appellants were charged with promoting prostitution of another person by owning, controlling, managing or supervising a house of prostitution. Specifically, the Appellants were charged with permitting a female employee to engage in the manual masturbation of a male customer as part of the full-body massage offered by the parlor.

A consolidated jury trial commenced on August 7, 1986 before the Honorable Carson V. Brown, President Judge of the Court of Common Pleas of Clinton County, Pennsylvania. At the

close of the Commonwealth's case, each Appellant raised a demurrer to the Commonwealth's evidence, alleging §5902 of the Crimes Code to be unconstitutionally void for vagueness due to the use of the words "sexual activity" and "deviate sexual relations" in the definition of prostitution as applied to this case. (Appendix at Pages 2a-7a). The trial court, describing the matter as one of first impression, overruled these objections on the basis that the prostitution statute was aimed at prohibiting the commercial explotation of sexual gratification. (Appendix at Pages 9a-15a). Following the testimony of one of the Appellants, the jury found both Appellants guilty of violating §5902.

Timely post-verdict motions raising the void for vagueness argument

were filed on August 15, 1986. In an opinion filed on January 23, 1987, the lower court again denied the Appellants' constitutional arguments, relying specifically on the Pennsylvania Superior Court case of Commonwealth vs. Robbins, 358 Pa. Super. 225, 516 A. 2d 1266 (1986). The lower court opinion is reproduced in the Appendix at Pages 16a-27a. In Robbins, supra, decided on November 5, 1986 (after the appellants' trial), the Superior Court held that manual masturbation for hire is covered by the term "sexual activity" in §5902 and that §5902 is not unconstitutionally vague. This was the first Pennsylvania appellate court to address the issue - the lower court decisions were split.

The Appellants timely appealed Judge Brown's decision to the Superior Court of Pennsylvania, once again

raising the constitutionality of applying §5902 to the facts in this case. On February 23, 1988, in an opinion authored by the Honorable Peter Paul Olszewski, Judge, a three judge panel of the court found that the term "sexual activity" in the prostitution statute includes masturbation or genital massage, that the prostitution statute gave reasonable notice of the conduct which it proscribed, and that its application to these facts did not violate due process. Commonwealth vs. Cohen, Pa. Super. , 538 A. 2d 582 (1988).

The Appellants filed a timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, alleging §5902 was unconstitutionally applied in this case. On October 5, 1988, the petition was denied by per curium order.

THE QUESTION IS SUBSTANTIAL

This case presents the important question of whether the current Pennsylvania penal statute prohibiting the promotion of prostitution is unconstitutionally vague as applied to to the promotion of manual masturbation for hire. The statute contains a limited definition of prostitution, and the previously enacted criminal statutes and prior court decisions required intercourse or penetration to establish an act of prostitution. The Pennsylvania appellate courts did not interpret the current statute to include manual masturbation until after the arrest and trial of the Appellants. This question raises the fundamental notions of due notice and fair warning inherent in criminal proceedings, as well as the traditional repugnance to retroactive application

of criminal statutes.

The standards required by the Fifth and Fourteenth Amendments are well settled. This Court has on numerous occasions stated the level of vagueness that a criminal statute must satisfy in order to meet due process standards:

> [That the words of a criminal statute] must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consistent alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process law.

Connally vs. General Constitution Co., 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322, 328 (1926).

Furthermore:

> It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statues. All are entitled to be informed as to what the state commands or forbids. (Citations omitted)

Lanzetta vs. New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, 619, 83 L. Ed. 888, 890 (1939); See also, United States vs. Harriss, 347 U. S. 612, 74 S. Ct. 808, 98 L. Ed. 989 (1954), Wainwrignt vs. Stone, 414 U. S. 21, 94 S. Ct. 190, 38 L. Ed. 2d 193 (1973); Rose vs. Locke, 423 U. S. 48, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975). Since the instant case does not raise any First Amendment issues, the statute must be examined in light of the specific conduct with which the accused are charged. Parker vs. Levy, 417 U. S. 733, 94 S. Ct.

2547, 41 L. Ed. 2d 439 (1974); United States vs. Mazurie, 419 U.S. 544, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975); Hoffman Estates vs. Flipside, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

The Appellants were found guilty of violating §5902(b)(1) of the Pennsylvania Crimes Code, Act of December 6, 1972, 18 Pa. C.S.A. §5902(b), which prohibits an individual from "owning, controlling, managing, supervising or otherwise keeping...a house of prostitution or a prostitution business". Prostitution is not expressly defined in the statute, although an individual may be found guilty of prostitution if he or she "engages in sexual activity as a business". 18 Pa. C.S.A. §5902(a)(1). Sexual activity is defined as "includ(ing) homosexual and other

deviate sexual relations." 18 Pa. C.S.A. §5902(f).

Due process requires that the language of a statute "convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Roth vs. United States, 354 U.S. 476, 491, 77 S. Ct. 1304, 1312, 1 L. Ed. 2d 1498 (1957), quoting United States vs. Petrillo, 332 U.S. 1, 7-8, 67 S. Ct. 1538, 1542, 91 L. Ed. 1877, 1883 (1947). In order to properly evaluate the fair import of the words used in the prostitution statute, the court must look to the historical usages of the language and its development into the modern day statute. Regents of University of California vs. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1979).

In Commonwealth vs. Lavery, 247

Pa. 139, 142, 93 A. 276 (1915), the Pennsylvania Supreme Court, adopting the common law definition, expressly found that prostitution was "not mere fornication or adultery confined to one man, but indiscriminate illicit intercourse for hire with any man seeking it". This Court, while passing on an immigration act that prohibited the importation of any alien woman for the "purposes of prostitution or any other immoral purpose", wrote, in United States vs. Bitty, 208 U. S. 393, 401, 28 S. Ct. 396, 398, 52 L. Ed., 543, 546 (1908).

> All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of "prostitution." It refers to women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men.

Thus, the traditional understanding of the word "prostitution" involved indiscriminate intercourse for hire.

In 1939, Pennsylvania adopted a new penal code which expressly adopted this view. See, Act of June 24, 1939, P. L. 872 §103, 18 P. S. §4103. Prostitution was defined by the state legislature as "the offering or using of the body for sexual intercourse for hire". See, also, Commonwealth vs. Stingel, 156 Pa. Super 359, 40 A. 2d 140 (1944).

With the backdrop of this traditional definition of prostitution, the General Assembly of Pennsylvania in 1973 adopted the current crimes code, a code based upon the provisions of the Model Penal Code. The new code section dealing with prostitution is noteworthy for its lack of a specitic definition of prostitution, especially since the

prior statutory definition was so clear and accepted. Preliminary drafts of the Model Penal Code contained an expansive definition of the term "sexual activity" which would have expressly included manual masturbation under the category of pronibited "sexual contact". In the final draft, however, this definition was altered to be the less inclusive one found in the Pennsylvania Crimes Code. The comments to the tentative draft and the final draft reflect the intention of the drafters to limit the scope of the prostitution statute to not "reach every engagement in sexual activity for hire". See, Comment to §207.12(b) of the Tentative Draft No. 9 of the Model Penal Code, p. 177; Comment to §251.2(1) of the Proposed Official Draft of the Model Penal Code, p. 236. The final draft included a more limited

expansion of the term "sexual activity" to include homosexual and deviate sexual relations, and continued the commonly understood and traditional definition of prostitution.[1]

There is no doubt that the acts alleged in this instance fall outside the scope of homosexual acts. The term "deviate sexual relations" is undefined; however, the legislature has

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[1] In Commonwealth vs. Potts, 314 Pa. Super. 256, 460 A. 2d 1127 (1983), the Pennsylvania Superior Court determined the current prostitution statute was not unconstitutionally vague as applied to acts of sexual intercourse and fellatio. The court wrote, at 314 Pa. Super. at 260, 460 A. 2d at 1134-35, "(i)n the present Act [18 Pa. C.S.A. §5902], the Legislature did not eradicate the commonly understood definition of "prostitution" but merely clarified it to include "homosexual and other deviate sexual relations."...It cannot be gainsaid that "prostitution" has persisted since biblical times, and, as such, has acquired a traditional meaning, i.e., "indiscriminate illicit intercourse for hire." (citations omitted).

defined deviate sexual intercourse as "sexual intercourse per os or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal". 18 Pa. C.S.A. §3101. By definition, penetration is necessary for intercourse. 18 Pa. C.S.A. §3101. Thus, based upon the definitions used by the legislature, the fair import of the phrase "deviate sexual relations" is limited to any sexual relations per os or per anus between unmarried individuals during which penetration is not achieved. Manual masturbation does not fall witnin this prohibition.

Due process also requires the legislature to establish minimal guidelines to govern law enforcement to avoid "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal

predilections." Kolender vs. Lawson, 461 U. S. 356, 358, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903 (1983). Judicial interpretations of legislative enacements may provide guidance but cannot replace the duty of the legislature to specifically prohibit certain conduct. In determining which acts are prohibited by a particular statute, due process permits guidance to come from legal dictionaries, treatises and judicial opinions. Rose vs. Locke, supra. This fundamental concept of forseeability and predictability in the criminal law has formed the foundation of due process jurisprudence. See, Article 1, §10 of the Federal Constitution; Bouie vs. Columbia, 378 U. S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

Since the meaning of a criminal statute is at issue, the goals of

forseeability and predictability are furthered by considering rules of statutory construction. These rules are codified in Pennsylvania in the Statutory Construction Act of 1972, 1 Pa. C.S.A. §1501, et seq. The rules provide that all penal provisions shall be strictly construed. 1 Pa. C.S.A. §1928(b)(1). Further, 1 Pa. C.S.A. §1922(4) provides that in ascertaining the intention of the General Assembly in the enactment of a statute, it may be presumed that when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language. Further, 1 Pa. C.S.A. §1921(c) provides:

> (c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other

matters:

(1) The occasion and necessity for the statute.

(2) The circumstances under which it was enacted.

(3) The mischief to be remedied.

(4) The object to be attained.

(5) The former law, if any, including other statutes upon the same or similar subjects.

(6) The consequences of a particular interpretation.

(7) The contemporaneous legislative history.

(8) Legislative and administrative interpretations of such statute.

Since statutes are not presumed to make changes in the principles of common law or prior existing law, the failure of the legislature to specifically define prostitution to include sexual activity other than the well-settled act of intercourse, and the specifically added homosexual acts and deviate sexual relations, indicates that the legislature did not intend any change in the prostitution statute beyond

those specifically noted. See, Commonwealth vs. Miller, 469 Pa. 24, 364 A. 2d 886 (1976).[2]

Indeed, the legislature was well aware of the means to define "sexual activity" to include acts of manual masturbation if it indeed had intended that result. In the obscenity statute found in 18 Pa. C.S.A. §5903, also

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[2] The appellate court upheld the statute on the grounds that the "common and approved usage" of the term "sexual activity" included manual masturbation, especially in light of the legislative purpose to "prohibit the commercial exploitation of sexual gratification." This construction of the statute, relying on two rules of construction, does not follow when the other rules of construction are applied and is arguably a post hoc rationalization aimed at upholding the validity of the statute as applied to these appellants.

The uncertainty created by these several well-accepted rules of construction, and the lack of a definitive holding from the Pennsylvania appellate courts until after the appellants' arrest and trial, creates the lack of fair warning and due notice required by the federal constitution.

based upon the Model Penal Code, the legislature expressly defined sexual conduct to mean "acts of masturbation, homosexuality, sexual intercourse, or physical contact with the person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breasts". 18 Pa. C.S.A. §5903(e)(3). This definition of sexual conduct is required by Miller vs. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), and its progeny. The legislature, by failing to so define "sexual activity" in the prostitution statute, and in light of the long held definition requiring intercourse under the previously existing penal codes and court decisions, did not provide fair warning and due notice to the Appellants that their actions were prohibited by the prostitution statute, and, therefore,

the application of the prostitution statute to these facts is repugnant to the due process requirements of the Fifth and Fourteenth Amendments.

The Superior Court of Pennsylvania, in ruling on the constitutional challenge to the statute, cited as controlling its earlier pronouncement in Commonwealth vs. Robbins, supra, a case involving nearly identical facts. In Robbins, the Superior Court, admittedly deciding the issue for the first time, and specifically referring to the split in lower court decisions, found that the "common and approved usage" of the term sexual activity, based on the statute's underlying purpose of prohibiting commercial exploitation of sexual gratification, included manual masturbation and left "no doubt that masturbation for hire falls within the

statute's proscription". 358 Pa. Super at 230-231, 516 A. 2d at 1269.

It is well settled that a complaint of vagueness or lack of notice that a defendant's conduct was criminal will fail where the acts committed were among those that prior cases had held were covered by the statute. See, Wainwright vs. Stone, 414 U. S. 21, 294 S. Ct. 190, 38 L. Ed. 2d 179 (1973); Rose vs. Locke, 423 U. S. 48, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975). In Wainwright, this Court held that since prior Florida case law had held copulation per os and copulation per anum to constitute "the abominable and detestable crime against nature" the statute was not unconstitutionally vague. The Court wrote:

> The judgment of federal courts as to the vagueness or not of a state statute must be made in the light of prior state constructions of

> tne statute. For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation "we must take the statute as though it read precisely as the highest court of the state has interpreted it." When a state statute has been construed to forbid identifiable conduct so that "interpretation by (the state court) puts these words in the statute as definitely as if it had been so amended by the legislature," claims of impermissible vagueness must be judged in that light. This has been the normal view in this court. (Citations omitted)

Wainwright vs. Stone, supra, 414 U. S. at 23, 94 S. Ct. at 192, 38 L. Ed. 2d at 182.

In the instant case, the Appellants did not have the benefit of the Pennsylvania appellate court decision including masturbation within the prostitution statute. The lower courts were decidedly split on the issue. This uncertainty over the

language used in the statute, and the honest debate among the lower courts over the meaning of the language, establishes the vagueness and lack of fair warning and due notice of which the appellants complain.[3]

This act of retroactive judicial legislation and its application to the facts of this case raises the very danger of a prosecution under a vague statute: e.g. that a defendant cannot be sure which way a court will rule in construing the vague statute. As

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[3] The appellants do not contend that merely because the appellate courts had not ruled on the issue the statute must necessarily be found vague. To the contrary, due process requires that each matter be evaluated on a case-by-case basis. However, the appellants do rely on the legislative history, and on the judicial constructions of the prior statute and current statute as of the time of their arrest to establish that they had not been fairly warned that their actions were prohibited.

stated in Bouie vs. Columbia, supra, 378 U. S. at 352-353, 84 S. Ct. at 1702, 12 L. Ed. 2d at 899:

> As the court recognized in Pierce vs. United States, 314 U. S. 306, 311, 86 L. Ed. 226, 231, 62 S. Ct. 237, "judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot " be cured in a given case placing valid limits on the statute," for "the objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss..." (Citations omitted)

The Superior Court's application of the Robbins holding to these facts

as dispositive of the constitutional challenge does not address how the appellants were to be guided by the 1986 Robbins decision in determining which activities were prohibited by the prostitution statute in 1985. The due process clauses of the Fifth and Fourteenth Amendments require the legislature to pass criminal statutes that fairly proscribe certain acts. While a court may provide future guidance of prohibited acts, individuals, in the absence of judicial guidance, should not be held to anticipate an unexpected post-operative judicial construction of a criminal statute.

Based upon the appellants' fair reliance on the language of the statute, the legislative history and the judicial decisions entered prior to their arrest, the prostitution statute

has been unconstitutionally applied to the appellants' conduct, and the appellants' convictions should be overturned.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully Submitted,

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Date: November 30, 1988

IN THE
SUPREME COURT OF THE UNITED STATES
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IN THE COURT OF COMMON PLEAS,
CLINTON COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA NO. 58-86

vs. CRIMINAL

TERRY GEORGE RUGER

- a n d -

COMMONWEALTH OF PENNSYLVANIA NO. 59-86

vs. CRIMINAL

LEE COHEN

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TRANSCRIPT OF JURY TRIAL held in Courtroom No. 2 at the Courthouse, Lock Haven, Pennsylvania, beginning with an in camera proceeding at 9:34 a.m. on Thursday, August 7, 1986, before the Honorable Carson V. Brown, President Judge of the Twenty-fifth Judicial District of the Commonwealth of Pennsylvania.

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APPEARANCES:

MERRITT E. McKNIGHT, Esquire, District Attorney, Lock Haven, PA, on behalf of the Commonwealth of Pennsylvania.

E. FRANKLIN MARTIN, Esquire, Waynesboro, PA, on behalf of Defendant Terry George Ruger.

PETER P. GRIFFIN, Esquire, Lock Haven, PA, on behalf of Defendant Lee Cohen.

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Reported by Mona M. Shoemaker, Official Court Reporter, Clinton County, Lock Haven, PA.

(Note: Only pages 55 through 62 are reproduced in the Jurisdictional Statement Appendix)

(PAGE 55)

THE COURT: All right. Let the record show the jury has cleared the courtroom and the matter is still in session in the presence of the Defendants and counsel. I don't know who wishes to go first or if you are going together or --

MR. MARTIN: Your Honor, on behalf of Mr. Ruger and, I believe, also, Mr. Cohen, we would demur to the

evidence, first of all, based on the fact that the prosecution has only proven that masturbation -- that the only act performed was that of masturbation, or hand release, and that the crime of prostitution does not include that act; and, therefore, the crime has not been committed against our clients (sic.) and this Court should sustain our demurrer.

Should I give you all -- the second --

THE COURT: Why don't you give us everything you have; and if Mr. Griffin agrees, I'll get Mr. McKnight's response.

MR. MARTIN: The second would be, your Honor, that we would object to the statute itself as unconstitutional as void for vagueness for the reason that the crime of prostitution includes the term "deviate sexual relations" and

that there is no * definition for that term, and we feel that that term is so vague that it cannot be defined by the Court or by the jury and is, therefore, unconstitutional.

That would be the only two, your Honor.

THE COURT: All right, Mr. McKnight. Do you have a response, then?

MR. GRIFFIN: Your Honor, --

THE COURT: Oh, I'm sorry. Mr. Griffin, do you vant (sic) to join in that or add to it?

MR. GRIFFIN: Well, your Honor, in reviewing the cases, I was aware that in one situation like this only one of the attorneys mentioned one co-defendant's name and, therefore, it didn't apply to the second one. I want to make sure that both Mr. Martin and I, if we only use one name, are

implying both and both should be a matter of record.

Again, on the demurrer, your Honor, I think the statute is constitutionally vague. Mr. Martin has mentioned the fact that it does not define "deviate sexual conduct." I would point out that the only place in the Code that I know of where the term "deviate sexual" is provided is in the case of Deviate Sexual Intercourse which defines it as either intercourse per os, by the mouth, or per anus or with an animal. I think that that shows that the term "deviate sexual" means so far out from the norm because you are taking the only time used from normal, natural sexual intercourse to

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intercourse with an animal; and I * don't think the distance from some sort of sexual activity to the hand release

is that far and it does not become deviate. The model code on which this is based does cite that the code is not to prohibit all sexual activities for hire. I believe that includes the act of masturbation as compared to some others; for example, if that were the case, could not the Commonwealth charge prostitution on some girl who sells her kiss for a dollar for a charitable event, if there is no limitation on the word "sexual activity"?

The other questions, your Honor, if you look at the history of the cases where prostitution takes on the traditional meaning with the requirement of some sort of penetration, the changes in the law simply have expounded to include other things and I feel that the demurrer should be sustained in that, 1., hand release is not proscribed by the statute.

2., that it is so constitutionally vague that when there is only the question of hand release, and since questions of vagueness are handled on a factual basis case by case, all of the ones that I have read have dealt with some form of penetration that I would ask the Court to dismiss the charges.

THE COURT: Mr. McKnight?

MR. McKNIGHT: Your Honor, we feel that the demurrer should not be sustained. I think we feel the Commonwealth has presented a case in which there was sexual activity, the sexual activity being the masturbation

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of the customer on December 16, * 1985. We feel that the situation is which there has been the stimulation of a male genital area which proceeds through erection and ejaculation certainly qualifies as a sexual

activity and, as such, it was done as a business. Money was received for that. The evidence shows that hand release was included in the massage and was part of the massage and, as such, the business is a prostitution business; and the evidence clearly shows that the two Defendants were involved in the ownership and management of that business; and , therefore, the demurrer should be denied.

With regards to the constitutional question, we do not feel that it is vague, again, for the same reasons. It is clearly a sexual activity for sexual gratification which resulted in the ejaculation which was proven with the testimony of Corporal Sweeting as well as the stipulated agreement of Donald Bloser, II.

THE COURT: Well, the issue

presented by the demurrer is one of first impression. Neither side has presented any appellate authority on this precise issue of whether masturbation constitutes a form of prostitution. The Court has been aware for some time now that Defendants were taking this legal position. So, I have had some opportunity to think about it and do some research on my own as well as take into account several cases that were cited to the Court and presented this week by Mr. Griffin.

The starting point in this issue, I believe, would be the statutory definition of prostitution to

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the extent there is * one. I think the Court has to focus on Section 5902(a) as well as Section 5902(f) of the Crimes Code.

Section 5902(a) defines

prostitution in terms of sexual activity as a business. Section 5902(f) then goes on to attempt to define sexual activity, and it uses the phraseology "homosexual and other deviate sexual relations." The Court also believes the P.B.I. Standard Jury Instructions also refer to ordinary sexual relations as being included within the definition of prostitution.

In attempting to read or use those definitions, the Court finds it somewhat helpful to refer to the case of Commonwealth vs. Potts, which is a Pennsylvania Superior Court decision brought to the Court's attention by Mr. Griffin. The case is located at 460 A.2d 1127. It's a 1983 case. On page 1136 the Court, in dealing with the constitutional issue of vagueness, concludes that the statute was constitutional (sic) based upon it

having an ascertainable standard of conduct which was consistent with constitutional standards of vagueness by referring to the defined evil of -- and I quote this -- commercial exploitation of sexual gratification.

I think assessing the act of masturbation in terms of its end result to which the Commonwealth has referred, that being the ejaculation of seminal fluids and the accompanying climax of sexual gratification, the Court is inclined to take the position that the Legislature intended to include the act of masturbation as a form of prostitu-

(* PAGE 60)

tion. I think the jargon within * the Defendants' own business for this act as being a -- quote -- hand release -- end quote -- is an obvious reference to the release of seminal fluids preceded by hand manipulation of the customer's

penis. In common parlance or understanding, I think masturbation, or hand release, would not constitute ordinary sexual relations between a man and a woman as manifested by copulation. So, not being ordinary, the Court believes it would be a form of deviate sexual relations as envisioned by Section 5902(f).

I think, furthermore, if offered as a service for money, it then would be a sexual activity as a business, which is the definition under Section 5902(a); and at the very least, the Court believes the jury should be permitted to deliberate on that, probably as a mixed question of fact and law as to whether that constitutes an act of prostitution.

The Court is aware of the case of Commonwealth vs. Dugan, 5 D & C 3rd 406, which is a York County decision in

1977. Judge Erb in that case did find that the act of solicited masturbation was not an act of prosecution (sic). The Court notes that that is not a binding decision on this Court. I have considered the rationale of Judge Erb's opinion and I am inclined to reject it because in that very short opinion he focused on the term "sexual intercourse," which, of course, does require penetration and that's what is (sic) decision is grounded upon. I think by doing that the court ignored

(* PAGE 61)

the applicable terms under * Section 5902, which there are two of them in the Court's judgment. One is "sexual activity" under Section 5902(a) and "sexual relations" under Section 5902(f). Those terms are broader than "sexual intercourse," and they do not require penetration; and I think,

rather, sexual gratification would be the focal point, again referring back to the Potts decision.

With regard to the second aspect of the demurrer, and that would be whether the "deviate sexual conduct" phrase in Section 5902(f) is overly vague or excessively vague and therefore unconstitutional, I think the Court, again, would turn to the Potts decision. I don't know if it ruled on that particular term except I don't know where else the Court could have categorized the activity which is in question there; but the Court, again, and I repeat this, said that an ascertainable standard of conduct by reference of the defined evil of commercial exploitation of sexual gratification is not excessively vague and does put the community on notice as to what sexual activity would be

prohibited. In this regard the Court believes the focal point would be on the end result, the ejaculation, which is a sexual climax commonly considered to be sexual gratification, which is not vague as distinguished from the kissing situation referred to by Mr. Griffin. I think that conduct clearly doesn't result in a climax which amounts to sexual gratification.

For those reasons, the Court will deny the demurrer submitted on behalf of both Defendants and rule that

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the evidence * does present a jury issue, both factually and legally, as to whether the complained-of act of offering service for masturbation as a business enterprise constitutes prostitution.

We will recess until a quarter after 1:00. Is there a question?

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA NO. 58-86

vs. CRIMINAL

TERRY GEORGE RUGER

and

COMMONWEALTH OF PENNSYLVANIA NO. 59-86

vs. CRIMINAL

LEE COHEN

OPINION AND ORDER

Re: Defendants' Post-Verdict Motions

ORAL ARGUMENTS: December 30, 1986
9:15 A.M. - Court Room No. 2

APPEARANCES: Ted McKnight, Esq., District Attorney, Lock Haven, Pennsylvania for the Commonwealth

Harold N. Fitzkee, Jr., Esq., York, Pennsylvania, for Defendant Terry George Ruger.

Peter P. Griffin, Esq., Lock Haven, Pennsylvania, for Defendant Lee Cohen.

Both Defendants in these consolidated proceedings were charged with Prostitution and Related Offenses in violation of Section 5902(b)(1) of the Crimes Code. Following a jury trial on August 7, 1986 the jury returned verdicts of guilty against both Defendants for the underlying charge. The Commonwealth's theory at the time of trial was that Defendants promoted prostitution of another person by owning, controlling, managing, or supervising a house of prostitution. In this case the Defendants were the owners and operators of the Taj Mahal II a massage parlor. The basis for the charge related to the giving of a full body massage which included a "hand release" which term is a euphemism for masturbating the establishment's male clientel. (sic)

The first issue raised by

Defendants is that the Court erred in ruling that the statute upon which the underlying charge was based was constitutional. Under this argument Defendants have also argued that the act of masturbation is not included as an act of prostitution. Thus the Court is faced with a somewhat unwieldy argument that the statute is unconstitutional but on the other hand that the act of masturbation does not come within the statute. Thus the Court sees two arguments which must be addressed under Defendants' first issue.

These issues were argued quite extensively at the time of trial and the Court ruled against Defendants on both of them. Since that time the case of Commonwealth of Pennsylvania vs. Robbins, ____ Pa. Super. ____, 516 A. 2d 1266 (1986) has been decided. The constitutional argument being advanced

by Defendants in this case was addressed by the Robbins court and the statute was held to be constitutional and not defective for vagueness. In addition Robbins also addressed the issue of whether masturbation for payment of money violated the prostitution statute and the Court concluded that it did. Thus both of these issues as raised by the Defendant have been decided by an appellate court of this Commonwealth. This Court is not free to speculate either that the statute is unconstitutional for vagueness or that the act of masturbation does not constitute an act of prostitution as a sexual activity engaged in as a business. Thus Defendants' first argument will be dismissed.

The second issue raised by Defendants is that during the course of

the trial the Court erred in not allowing Defendant Cohen to testify with respect to his intent in operating the establishment. Specifically Defendant wished to testify that he had been advised by counsel that the act of having employees masturbate the business' clientel (sic) was not illegal under any law of the Commonwealth of Pennsylvania, and also that Defendant was aware through his other business dealings that at least one county court in the Commonwealth specifically held that such conduct was not illegal. Defendant is relying on a case involving his business in York County. It is true that in that particular decision the lower court ruled that the masturbation of male clients did not constitute a sexual activity so as to come within the realm of the prostitution statute. However,

as counsel acknowledged that decision did not have statewide application and since Robbins it would not be a correct statement of the law even in York County.

At the time of the trial the Court concluded that the proposed effect of Defendant's offered testimony was to set up his perception of the law as determined through a lower court decision with respect to whether the act of masturbating a client for money was a sexual activity. As such the Court concluded that Defendant was attempting to assert ignorance of the law or mistake of law as a defense. In reviewing the Crimes Code the Court's research disclosed that ignorance or mistake of a matter of fact can be a defense in a criminal proceeding, but that the legislature specifically rejected including ignorance or mistake

of law as a possible defense to a criminal charge.

Defendant's position that the Court prohibited him from raising intent as a defense to the charge of prostitution is somewhat misplaced. The intent to commit the crime of prostitution as the Court perceives it relates to the intent to commit the specific acts prohibited by the statute. Such intent cannot relate to the Defendant's perception of the law since to do so would be to create an extremely questionable policy of allowing a defendant to submit to a jury that his understanding of the law did not make the criminal conduct a crime. The authority cited by Defendant for his position seem to deal primarily with mistakes of fact as a defense. The Court recognizes these cases. In particular the case of

Commonwealth vs. Bollinger, 179 A.2d 253, 197 Pa. Super. 492 (1962) as cited by Defendants in their brief states specifically that "a bona fide and reasonable belief in the existence of facts which, if they did exist, would render an act innocent, is a good defense." Thus the Defendants argument discloses that a mistake of fact can be a defense in a criminal proceedings. However, Bollinger does not refer to a mistake of law as being a defense in a criminal case. Thus the Court will stand by its original ruling.

Defendants' final argument relates to what is contended to be hearsay testimony from Corporal Pearl Sweeting of the Pennsylvania State Police. Corporal Sweeting was an undercover agent with respect to this prosecution and had answered an employment ad from Defendants'

establishment for a masseuse. Upon entering Defendants' establishment Corporal Sweeting had various conversations with Defendants' other masseuse employees who were acting in the course of their duties in explaining to Corporal Sweeting what services were delivered to the business' clientel (sic). In particular the other employees advised Corporal Sweeting that a hand release was a standard part of the massage procedure. It was the Court's position and still is that Defendants employees were acting within the scope of their employment and as such their utterances to Corporal Sweeting as to the nature of the business were admissible against the Defendants and this would be true whether the action was a civil proceeding or a criminal proceeding.

In the event the Court's ruling

is erroneous, it should be noted that at no time throughout the proceedings did the Defendants deny that a "hand release" was a standard service Administered to clients. From the outset of the trial this point was admitted. Thus the Court would find this error, if it existed, to be harmless beyond a reasonable doubt.

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA NO. 58-86
vs. CRIMINAL
TERRY GEORGE RUGER
and
COMMONWEALTH OF PENNSYLVANIA NO. 59-86
vs. CRIMINAL
LEE COHEN

ORDER

AND NOW, January 23, 1987, based upon the foregoing Opinion, IT IS HEREBY ORDERED THAT Defendants' Post-Verdict Motions be dismissed and the requested relief be denied, and that a pre-sentence investigation report regarding the Defendants be prepared by Clinton County Adult

Probation Services upon the completion of which the matter shall be scheduled for sentencing.

BY THE COURT:

/s/ C. V. Brown
P.J.

IN THE SUPERIOR COURT
OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appelle

No. 309

v.

Harrisburg
1987

LEE LEWIS COHEN,
Appellant

Appeal from the Judgment of Sentence April 24, 1987, in the Court of Common Pleas of Clinton County, Criminal No. 59-86.

IN THE SUPERIOR COURT
OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

Appelle

No. 310

v.

Harrisburg
1987

TERRY GEORGE RUGER,
Appellant

Appeal from the Judgment of Sentence April 24, 1987, in the Court of Common Pleas of Clinton County, Criminal No. 58-86.

BEFORE: OLSZEWSKI, DEL SOLE, and JOHNSON, JJ.
OPINION BY OLSZEWSKI, J.:
FILED: February 23, 1988

This is a consolidated appeal from the trial court's judgment of

sentence following a jury trial at which appellants were convicted of prostitution and related offenses in violation of 18 Pa. C.S.A. §5902(b)(1). For the reasons stated below we affirm the order of the trial court.

Appellants were the owners and operators of the Taj Mahal II, a massage parlor. They were brought to trial on the charge of promoting prostitution of another person by owning, controlling, managing or supervising a house of prostitution. The basis for the charge was the giving of a full body massage by nude female masseuses. The massage included a "hand release", a euphemistic term for masturbating the male clients of the establishment. Following appellants' conviction of promoting prostitution, post-trial motions were filed and

denied. This appeal followed.

Appellants raise three issues for our review: (1) did the lower court err in finding that 18 Pa. C.S.A. §5902 was not unconstitutionally vague as applied to the instant case; (2) was it proper for the court to deny appellant Cohen the right to testify concerning his reliance on legal information and advice which he had received before entering into the "massage" business; and (3) was the trial court correct in its decision to permit introduction of the testimony of an employee as an admission against appellants even though appellants were not present when the statement was made.

Prostitution is prohibited in Pennsylvania by 18 Pa. C.S.A. §5902, Prostitution and Related Offenses. Section 5902 provides in pertinent part:

(a) Prostitution -- a person

> is guilty of prostitution; a misdeameanor of the third degree, if he or she:
>
> (1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; . . .

(Emphasis added.). Sexual activity is defined in 18 Pa. C.S.A. §5902(f) as including homosexual and other deviate sexual relations.

Appellants contend that the definition of "sexual activity" is a limited one not including masturbation or genital massage. Alternatively, they contend that Section 5902 is vague and was unconstitutionally applied in the instant case.

We feel that both of these contentions are adequately addressed by this Court's prior pronouncements in this area.

With respect to the contention that "sexual activity" does not include

masturbation or genital massage, this Court stated the following:

> "In the mind of a man of 'common intelligence' the term sexual activity clearly encompasses masturbation as a business. Indeed, as we have already observed, it is difficult to believe that any man of common intelligence would consider the massaging of the genitals of an unclothed man by a nude or partially nude female to be anything other than sexual activity."

Commonwealth v. Robbins, 358 Pa. Super. 225, 516 A.2d 1266 (1986), appeal denied, _____ Pa. _____, 527 A.2d 538 (1987), quoting Commonwealth v. Israeloff, 8 D. & C. 3rd, 5 (1978).

We now undertake a review of appellants' contention that 18 Pa. C.S.A. §5902 is vague and that its application to the present situation is achieved through judicial legislation and is therefore unconstitutional. Specifically, appellants contend that the statute does not give reasonable

notice of the conduct which it proscribes, therefore it violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Commonwealth v. Heinbaugh, 467 Pa. 1, 5, 354 A.2d 244, 246 (1976)

> It is settled that the fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual criminally responsible for conduct he could not reasonably understand to be proscribed.

Rose v. Locke, 423 U.S. 48, 49, 96 S.Ct. 243, 244, 46 L.Ed.2d 185, 188 (1975). However,

> [T]he Constitution does not require impossible standards'; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . ." (Emphasis added) Roth v. United States, 354 U.S. 476, 491, 77 S.Ct. 1538, 1542, 91 L.Ed. 1877, 1883 (1947); see also District of Columbia v. Garcia, D.C.App., 335 A.2d 217, cert. denied, 423

U.S. 894, 96 S.Ct. 192, 46 L.Ed.2d 125 (1975).

In dealing with the exact same issue, with substantially the same factual setting, Commonwealth v. Robbins found that the appellant therein had notice and fair warning that she was violating the law by allowing the performance of manual sexual stimulation for money.

Appellants, however, fault Robbins for failing to recognize that the issue there, as here, was not whether the term "sexual activity" encompassed masturbation but whether masturbation is the type of activity intended to be prohibited by the Prostitution statute. Robbins specifically addressed this issue. We therefore quote the pertinent portion of that opinion.

> Furthermore, since the term "sexual activity" is undefined

> by the statute, we are obliged to construe that term according to its common and approved usage. Barasch v. Pennsylvania Public Utility Commission, 507 Pa. 430, 490 A.2d 806 (1985). See also Statutory Construction Act, 1 Pa. C.S.A. Section 1903 (a). When the term "sexual activity" is examined in light of the statute's underlying purpose of prohibiting commercial exploitation of sexual gratification and also in light of its common and approved usage, there is no doubt that masturbation for hire falls within the statute's proscription. Therefore, we find Section 5902(a) is not unconstitutionally vague so as to cause appellant to seriously believe that she was not providing some form of sexual gratification for the payment of money.

Commonwealth v. Robbins, 358 Pa. Super. at 230, 231, 516 A.2d at 1269 (Emphasis added.).

Appellants' next contention is that the trial court erred in not permitting one of the appellants, Lee Cohen, to testify that he had relied on certain legal information that the business with which he was involved was

not illegal. He cites Commonwealth v. Bollinger, 197 Pa. Super. 492, 179 A.2d 253 (1962) for the proposition "that a person is entitled to rely on the parameters in defining the legitimacy of their activities." (Appellant's brief at 17).

The legal information on which appellant relied is the case Commonwealth v. Jayne Dougan, 5 D. & C. 3d 406 (1978), which ruled that masturbation for hire did not constitute a sexual activity so as to come within the realm of the prostitution statute. This case is no longer a correct statement of the law since Commonwealth v. Robbins. Appellant argues, however, that the issue is not whether Dougan is controlling but whether his reliance on it negated his intent to commit the crime of promoting prostitution. We feel that the trial court aptly

addressed this argument when it stated:

> The intent to commit the crime of prostitution as the Court perceives it relates to the intent to commit the specific acts prohibited by the statute. Such intent cannot relate to the Defendant's perception of the law since to do so would be to create an extremely questionable policy of allowing a defendant to submit to a jury that his understanding of the law did not make the criminal conduct a crime.

(Trial court opinion at 4).

We are therefore in agreement with the trial court that the appellant, in asserting his reliance on an interpretation of the law by a lower court, was in fact attempting to assert his ignorance of the law or mistake of law, neither of which are a defense to the commission of a crime. See 18 Pa. C.S.A. §304 (providing for the defense of mistake of fact but not mistake of law).

Finally, appellants contend that

the trial court erred when it admitted testimony, that the appellants characterize as hearsay testimony, of one of the employees of appellants' establishment concerning the use of the "hand release" in the massage. Specifically, the court allowed the state police undercover officer to testify that one of appellants' masseuses had instructed her as to the method used in giving a "hand release" and that a "hand release" was to be given with a massage. The trial court permitted the testimony on the basis that the masseuse, an employee of appellants, was acting within the scope of her employment when shemade the statement and therefore it was admissible under an exception to the hearsay rule as an admission of a party. We find that the testimony was properly admitted, not as an exception

to the hearsay rule, but as non-hearsay.

Testimony by a third person as to extra-judicial utterances made by another, when offered to prove the truth of the matter averred therein, constitutes hearsay evidence and is inadmissible at trial. Commonwealth v. Perry, 279 Pa. Super. 32, 420 A.2d 729 (1980). Testimony as to an out-of-court statement is not hearsay, however, if offered to prove, not that the content of the statement was true, but that the statement was made. Commonwealth v. Sampson, 454 Pa. Super. 215, 311 A.2d 624 (1973). In the instant case appellants do not contend that a "hand release" was not being given at their establishment. In fact, at trial appellants' counsel indicated to the court that the fact that the hand release was to be given with every

massage was not an issue. (N.T. 8/7/86 at 21). Therefore we find that the statement by the masseuse that a "hand release" was to be given with a massage was not offered to prove that such a technique was employed but simply to show that the statement was made. It therefore was not hearsay and was admissible at trial.

For the reasons stated above, the judgment of sentence is affirmed.

DATED: FEBRUARY 23, 1988

JUDGMENT ENTERED

Shirley Bailey
Chief Clerk

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

No. 72 M. D. Allocatur Docket 1988

COMMONWEALTH OF PENNSYLVANIA,

Respondent

vs.

LEE LEWIS COHEN and TERRY GEORGE RUGER,

Petitioners

ORDER

"October 5, 1988

Petition Denied

s/Per Curiam"

IN THE SUPREME COURT OF PENNSYLVANIA

Harrisburg District

No. 72 M. D. Allocatur Docket 1988

COMMONWEALTH OF PENNSYLVANIA,

Respondent

vs.

LEE LEWIS COHEN and TERRY GEORGE RUGER,

Petitioners

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that Lee Lewis Cohen and Terry George Ruger, Petitioners, above named, hereby appeal to the Supreme Court of the United States from the Final Order of the Supreme Court of Pennsylvania, affirming the judgment of conviction and refusing a Petition for Alloctur,

entered herein on October 5, 1988.

2. This Appeal is taken pursuant to 28 U.S.C. Section 1257(2).

ROBERTS AND MICELI

BY: _____
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Attorney for Petitioners
146 East Water Street
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IN THE SUPREME COURT OF PENNSYLVANIA

Harrisburg District

No. 72 M. D. Allocatur Docket 1988

COMMONWEALTH OF PENNSYLVANIA,

Respondent

vs.

LEE LEWIS COHEN and TERRY GEORGE RUGER,

Petitioners

CERTIFICATE OF SERVICE

I, Lee H. Roberts, hereby state that I did send a true and correct copy of this Notice of Appeal to the United States Supreme Court to the Supreme Court of Pennsylvania addressed to them at 434 Main Capitol Building, Harrisburg, Pennsylvania 17108 on November 29, 1988 by Certified Mail and I did serve a true and correct copy of it on opposing counsel by regular mail

on November 29, 1988, first class, postage prepaid at the following address:

Merritt E. McKnight, Esquire
214 1/2 West Main Street
Lock Haven, PA 17745

ROBERTS AND MICELI

BY: _____
LEE H. ROBERTS, ESQUIRE
Attorney for Petitioners

STATUTORY PROVISIONS INVOLVED

§5902 Prostitution and Related Offenses (Pennsylvania Crimes Code)

(a) Prostitution. - A person is guilty of prostitution; a misdemeanor of the third degree, if he or she:

(1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or

(2) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.

(b) Promoting prostitution. - A person who knowingly promotes prostitution of another commits a misdemeanor or felony as provided in subsection (c) of this section. The following acts shall, without limitation of the foregoing, constitute promoting prostitution:

(1) owning, controlling,

managing, supervising or otherwise keeping, alone or in association with others, a house of prostitution or a prostitution business:

(2) procuring an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate;

(3) encouraging, inducing, or otherwise intentionally causing another to become or remain a prostitute,

(4) soliciting a person to patronize a prostitute;

(5) procuring a prostitute for a patron;

(6) transporting a person into or within this Commonwealth with intent to promote the engaging in prostitution by that person, or procuring or paying for transportation with that intent,

(7) leasing or otherwise permitting a place controlled by tne

actor, alone or in association with others, to be regularly used for prostitution or the promotion of prostitution, or failure to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means; or

(8) soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this subsection.

C. Grading of offenses under subsection (b). -

(1) An offense under subsection (b) constitutes a felony of the third degree if:

(i) the offense falls within paragraphs (b)(1), (b)(2) or (b)(3),

(ii) The actor compels another to engage in or promote prostitution,

(iii) the actor promotes

prostitution of a child under the age of 16 years, whether or not he is aware of the age of the child; or

(iv) the actor promotes prostitution of his spouse, child, ward or any person for whose care, protection or support he is responsible.

(2) Otherwise the offense is a misdemeanor of the second degree.

(d) Living off prostitutes. - A person, other than the prostitute or the prostitute's minor child or other legal dependent incapable of self-support, who is knowingly supported in whole or substantial part by the proceeds of prostitution is promoting prostitution in violation of subsection (b) of this section.

(e) Patronizing prostitutes. - A person commits a summary offense if he hires a prostitute to engage in sexual activity with him, or if he

enters or remains in a house of prostitution for the purpose of engaging in sexual activity.

(f) Definitions. - As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"House of Prostitution." Any place where prostitution or promotion of prostitutions is regularly carried on by one person under the control, management or supervision of another.

"Inmate." A person who engages in prostitution in or through the agency of a house of prostitution.

"Public place." A place to which the public or any substantial group thereof has access.

"Sexual activity." Includes homosexual and other deviate sexual relations.

Supreme Court, U.S.
FILED
DEC 29 198
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-898

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1988

LEE LEWIS COHEN AND
TERRY GEORGE RUGER,
Appellants

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

ON APPEAL FROM THE
SUPERIOR COURT OF PENNSYLVANIA

MOTION OF APPELLEE TO DISMISS

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MOTION TO DISMISS

The Commonwealth of Pennsylvania moves the Court to dismiss the appeal herein on the grounds that the questions on which the decision of the appeal depends are so unsubstantial as not to need further argument.

State Statute Involved

Appellants raise the question of whether Pennsylvania's statute prohibiting prostitution (Act of December 6, 1972, P.L. 1482, No. 334, § 1, as amended by the Act of October 4, 1978, P.L. 909, No. 173, § 2, presently codified at 18 Pa.C.S. § 5902) is void for vagueness as applied to them, owners and operators of a business which allowed male customers to purchase masturbation performed by nude or near-nude female employees.

Jurisdictional Statement

Cohen and Ruger have improperly invoked the jurisdiction of this Court under 28 U.S.C. § 1257(2).

By Public Law 100-352, signed June 27, 1988, and effective in ninety days, section 1257 of Title 28, United States Code was amended so as to delete section 1257(2) and in its place provide that where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution of the United States review may be had in this Court by a writ of certiorari. 28 U.S.C. § 1257(a).

Cohen and Ruger contend that the statute which prohibits prostitution in Pennsylvania is violative of the due process requirements of the Fourteenth Amendment.

Public Law 100-352 became effective on September 26, 1988. The judgment from which an appeal could be taken to this Court was the Pennsylvania Supreme Court's denial of a petition for allowance of appeal. This order was entered October 5, 1988.

Accordingly, Cohen and Ruger must proceed under section 1257, Title 28, United States Code as amended on June 27, 1988, and this action should be brought before this Court as a petition for a writ of certiorari to the Pennsylvania Supreme Court.

Statement of Facts

Cohen and Ruger were the owners and operators of the Taj Mahal II, a massage parlor operating in Dunnstable Township, Clinton County, Pennsylvania. Among the services offered by their establishment

was a full body massage given to male customers by nude female masseuses. Male customers were able to purchase a "hand release," a euphemistic term for masturbation of the customer to the point of ejaculation.

Cohen and Ruger were arrested and convicted of charges of promoting prostitution of another person by owning, controlling, managing or supervising a house of prostitution. Following the denial of post-trial motions, Cohen and Ruger appealed to the Superior Court of Pennsylvania arguing, inter alia, that Pennsylvania's statute prohibiting prostitution was unconstitutionally vague as applied to them in that the definition of "sexual activity" was a limited definition which did not include masturbation. Pennsylvania's Superior Court

rejected this argument by relying on a prior decision based on an identical issue, but decided after the conviction of Cohen and Ruger. Cohen and Ruger sought allowance of appeal from the Pennsylvania Supreme Court. Allowance of appeal was denied in an order entered October 5, 1988.

Argument

A statute will be found void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." United States v. Harriss, 347 U.S. 612, 617 (1954). Here, the relevant inquiry is whether the statute prohibiting prostitution in Pennsylvania gives the requisite warning that selling masturbation in the normal course of business is engaging in or

promoting prostitution. A common sense reading of the statute suggests that it does.

Pennsylvania establishes the offense of prostitution by providing that:

> A person is guilty of prostitution; a misdemeanor of the third degree, if he or she:
>
> (1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business: . . .

18 Pa.C.S. § 5902. Sexual activity is defined as "includ[ing] homosexual and other deviate sexual relations." 18 Pa.C.S. § 5902(f).

In construing the requirement that adequate notice be given of proscribed activities, the Court has said: "[T]he Constitution does not require impossible standards; all that is required is that the language conveys sufficiently de-

finite warning as to the proscribed conduct when measured by common understanding and practices." (emphasis supplied) Roth v. United States, 354 U.S. 476, 491 (1974).

When the language of Pennsylvania's statute is viewed in the light of common understanding and practices, the question becomes: if genital massage, to the point of sexual climax, administered to nude male customers by nude or near-nude female employees is not sexual activity for hire, what is it? The government suggests that to label such activity as anything other than sexual activity for hire requires a deliberate rejection of common sense and understanding.

Cohen and Ruger argue that the statute is impermissibly vague as applied to them in that the statute does

not specifically list masturbation as falling within the realm of sexual activity. Again, logic and common sense lead to the conclusion that masturbation, whose sole purpose is sexual gratification, is readily and simply understood to be sexual activity. Such a conclusion is supported by Pennsylvania's adoption of a principle of statutory construction that "words and phrases shall be construed according to rules of grammar and according to their common and approved usage: Act of December 5, 1972, P.L. 1339, No. 290, § 3, codified at 1 Pa.C.S. § 1903.

In Rose v. Locke, 423 U.S. 48, 49-50 (1975), this Court said that the prohibition against excessive vagueness "does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. . . All the Due Process clause requires is

that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden."

In 1983, well before appellants' 1986 arrest and conviction, Pennsylvania's intermediate appellate court determined that the statute prohibiting prostitution was "directed at a defined evil (commercial exploitation of sexual gratification). . ." Commonwealth v. Potts, 314 Pa.Super. 256, 273, 460 A.2d 1127, 1136 (1983) (statute's prohibition against sexual activity for hire encompassed defendant's agreement to perform fellatio for hire). This decision established the statute's underlying purpose as the prohibition of the sale of sexual services and made clear that in construing the statute, the Pennsylvania courts would not focus on the means through which sexual gratification was

achieved, but rather on whether that gratification was commercially exploited.

Pennsylvania's prohibition against engaging in sexual activity as a business clearly reaches the sale of masturbation. This conclusion is easily arrived at by a common sense understanding of what constitutes sexual activity. Accordingly, this appeal presents no substantial question for this Court and should be dismissed.

Finally, this matter should not be heard because it is now settled in Pennsylvania that "sexual activity", as used in the statute prohibiting prostitution includes masturbation. In Commonwealth v. Robbins, 358 Pa.Super. 225, 516 A.2d 1266 (1986), appeal denied ___ Pa. ___, 526 A.2d 538 (1987), Pennsylvania's intermediate appellate court considered the identical question which appellants

herein seek to raise: namely, whether the prostitution statute prohibits the commercial exploitation of masturbation. The Superior Court applied a "common sense and understanding analysis" to the statute and concluded that "sexual activity," as defined in the statute included masturbation. In so doing, the Superior Court wrote:

> In the mind of a man of 'common intelligence' the term 'sexual activity' encompasses masturbation as a business. . . . It is difficult to believe that any man of common intelligence would consider the massaging of the genitals of an unclothed man by a nude or partially nude female to be anything other than sexual activity . . . . . When the term 'sexual activity' is examined in the light of the statute's underlying purpose of prohibiting commercial exploitation of sexual gratification and also in light of its common and approved usage,

> there is no doubt that masturbation for hire falls within the statute's proscription.

358 Pa.Super. at 230, 516 A.2d 1266, 1268-1269 (1986).

Accordingly, the matter is settled in Pennsylvania and the resolution of the matter presented to the Court by Cohen and Ruger is of importance only to themselves.

Conclusion

Wherefore, the Commonwealth of Pennsylvania respectfully submits that the question upon which this case depends is so unsubstantial as not to need further argument, and respectfully moves the Court to dismiss this appeal.

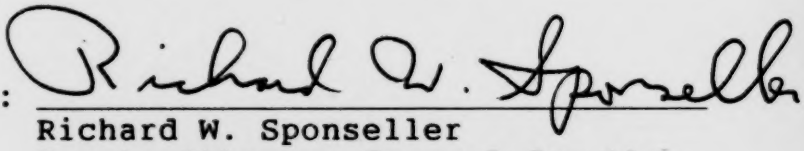
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